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No. 98-682

In The

Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND *AMICUS CURIAE* OF THE AMERICAN WATERWAYS OPERATORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AMERICAN WATERWAYS OPERATORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Waterways Operators ("AWO") respectfully moves for leave to file the attached Brief *Amicus Curiae* in Support of Petition for Writ of Certiorari (the "Brief"). AWO has obtained the consent of the counsel for the Petitioners to file its Brief.

INTEREST OF *AMICUS CURIAE*

AWO is a national association representing the inland and coastal tugboat, towboat and barge industry. AWO's more than 350 member companies include bulk commodities transporters, ship docking and harbor services operators, fueling, bunkering, and lightering services operators and shipyards. For over fifty years, AWO has worked to promote a better understanding of the unique nature of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy.

The Court of Appeals for the Eleventh Circuit's decision in this case held that Supplemental Rule F applies only to claims subject to limitation under the Limitation of Liability Act of 1851 and does not apply to claims subject to limitation under the Oil Pollution Act of 1990 ("OPA 90"). AWO believes that the denial of the *concursus* procedure of Supplemental Rule F in essence prevents vessel owners from obtaining the protection of the limitation of liability provisions in OPA 90. Additionally, in

contrast to the basic principle of judicial economy, this ruling also forces vessel owners to litigate claims arising from a single incident or casualty in multiple suits and multiple jurisdictions, resulting in conflicting results as well as multiple damage awards, the total of which will exceed the OPA 90 limitation amount. AWO also believes that the Eleventh Circuit's ruling will create immediate and damaging consequences for both the American petroleum products transportation industry and the American petroleum products market.

For the foregoing reasons, AWO respectfully moves for leave to file its Brief herein.

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BRIEF OF THE AMERICAN WATERWAYS OPERATORS, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

The American Waterways Operators (hereinafter "AWO") respectfully submits this Brief[1] as *Amicus Curiae* in Support of the Petition for Writ of Certiorari filed by Bouchard Transportation Company, Inc.; Tsacaba Shipping Company, Inc.; Maritrans Operating Partners L.P., et al. ("Petitioners").

INTEREST OF THE AWO AS *AMICUS CURIAE*

AWO is a national association representing the inland and coastal tugboat, towboat and barge industry. AWO is comprised of more than 350 member companies, including bulk commodities transporters, ship docking and harbor services operators, fueling, bunkering, and lightering services operators and shipyards. For over fifty years, AWO has worked to promote a better understanding of the unique nature of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy.

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[1] In conformity with Supreme Court Rule 37.6, *amicus curiae* states that no part of this Brief was authored by counsel for a party nor did any person or entity other than *amicus curiae* make any monetary contribution to the preparation or submission of this Brief.

A. The AWO represents a vital and responsible segment of the U.S. transportation industry.

The U.S. barge and towing industry is a diverse and vital segment of America's transportation system. Barges and towing vessels make nearly one million voyages annually from over 2,000 bulk cargo docks and terminals along the inland and coastal waterways. AWO members employ more than 33,000 people aboard 6,200 tugs and towboats and more than 30,000 barges. All told, our industry contributes more than $5 billion a year to the American economy. With operations along our nation's 25,194 miles of inland and intracoastal waterways, including the Atlantic, Pacific and Gulf coasts, our industry is diverse in terms of geographic areas served, the types of vessels operated, the range of cargoes carried, and the skills required to perform a given job.

Tug and barge transportation provides Americans with a cost-efficient and reliable means of moving the raw materials that fuel our national economy. Indeed, barges move fifteen percent of our nation's freight, and yet this service produces only two percent of the nation's total freight bill. The economic efficiency of barge transportation is matched by its energy efficiency, as barging is America's most energy efficient mode of surface transportation. One gallon of fuel will move a ton of cargo more than 500 miles by tug and barge.

The U.S. tug and barge industry is committed to providing its customers with transportation services that are not only efficient, reliable, and cost-effective, but as safe and environmentally sound as possible. In recent years, the industry has worked closely with the U.S.

Coast Guard to upgrade regulatory standards in such key areas as towing vessel operator qualifications and navigation equipment on towing vessels. Our commitment to safety and the environment is also demonstrated by industry-driven safety initiatives like the AWO Responsible Carrier Program, a code of safe practices for tug and barge companies, and the Coast Guard-AWO Safety Partnership, which brings our industry together with government to solve marine safety and environmental protection problems.

B. The civil liability of AWO members will be vastly enlarged under the Court of Appeals' ruling.

The Court of Appeals for the Eleventh Circuit's ruling in *Bouchard Transp. Co., Inc. v. Updegraff*, 147 F.3d 1344 (11th Cir. 1998), will have grave consequences, far reaching beyond the Tampa Bay oil spill or the individual parties in this case. The import of the Eleventh Circuit's ruling that claims under the Oil Pollution Act of 1990 ("OPA 90") are not subject to the *concursus* procedure of Supplemental Rule F cannot be overstated. If the Eleventh Circuit's ruling is allowed to stand and the procedural tool of *concursus* is precluded from use where claims arise under OPA 90, there will be no way to assure that vessel owner liability will not exceed the limitation specifically set by Congress. Put another way, the ruling of the Eleventh Circuit effectively prevents vessel owners from availing themselves of the limitation of liability provisions created by Congress in OPA 90. The practical effect of the Eleventh Circuit's ruling is that vessel owners must create, not one, but potentially several

funds in various jurisdictions for assorted and scattered claimants. The further result of the Eleventh Circuit's decision is that vessel owners (and the Courts) will be vulnerable to inconsistent verdicts, not only in regard to liability but also in regard to the issues of priority of claims and amount of limitation. Finally, vessel owners will now be required to defend the multitude of claims arising from a single pollution incident in numerous state courts and the Federal District Courts, wherever the owner is subject to personal jurisdiction. The Eleventh Circuit's holding, therefore, has the potential to impact drastically America's shipping industry because it essentially annuls OPA 90's defense of limitation of liability, while it encourages multiple proceedings in numerous jurisdictions. The decision below sentences vessel owners to perpetual litigation and inconsistent judicial rulings for OPA 90 claims arising out of one single incident. Accordingly, AWO respectfully urges this Court to review and then reverse the decision of the Eleventh Circuit.

THE ISSUE ON APPEAL OF CONCERN TO *AMICUS CURIAE*

The issue on appeal of concern to AWO is whether district Courts, in exercising their admiralty and maritime jurisdiction, should apply the *concursus* procedure of Supplemental Rule F to implement the limitation of liability provisions of OPA 90, which were granted to vessel owners by Congress.

SUMMARY OF AMICUS CURIAE ARGUMENT

The ruling of the Eleventh Circuit that Supplemental Rule F does not apply to claims brought under OPA 90 denies vessel owners the Congressionally granted limitation rights of the statute. Although Congress enacted OPA 90 in order to raise the limit of damages recoverable under the Limitation of Liability Act of 1851 (46 U.S.C. §§ 183, 185) (the "Limitation Act"), Congress was explicit and clear in its intention to continue in OPA 90 the long standing policy of a regime of limitation of liability. However, by denying vessel owners the use of Rule F and the *concursus* procedure for claim adjudication, the Eleventh Circuit effectively does away with the limitation provisions of OPA 90. The limitation provisions are a key feature of the OPA 90 scheme devised by Congress.

Without the procedural tool of Rule F, which mandates a marshaling of all claims against the vessel owners and the limitation fund, the Courts cannot guarantee that Congress' intention to limit the liability of vessel owners will be preserved. If claimants are allowed to pursue claims against a vessel owner in various jurisdictions, vessel owners will undoubtedly face inconsistent judgments and damages that far exceed the statutory limitation of liability. Additionally, by depriving the District Courts of their power to marshal claims for adjudication, the Eleventh Circuit creates a consequence of judicial inefficiency, as claims against one limited fund, arising from one set of facts, will be litigated in multiple suits in multiple jurisdictions.

Additionally, by allowing piecemeal and fractional litigation, the Eleventh Circuit has disregarded one of the

most essential goals of the judicial process: to compensate claimants adequately and quickly and return resources back into commerce where they can continue to be productive. If let stand, the ruling of the Eleventh Circuit will only delay the claims proceedings regarding oil spills and waste away the capital assets of our country's waterborne transportation fleet.

Finally, the Eleventh Circuit's decision does not suggest that claimants in this case, or in general, will suffer any prejudice as a result of the application of Rule F to OPA 90 claims. On the contrary, however, the preclusion of the use of Rule F and *concursus* will severely prejudice shipowners and operators.

ARGUMENT

I. The Ruling of the Eleventh Circuit effectively prevents vessel owners from availing themselves of the limitation of liability provisions created by Congress in OPA 90.

A. In OPA 90, Congress sustained the right of vessel owners to limit their liability for damages for claims arising from oil spills.

When Congress created OPA 90 (33 U.S.C. § 2704), its goal was not to do away with the limitation of liability theory under which maritime law has operated for over one hundred years. Instead, Congress in OPA 90 replaced the traditional formula for calculating a vessel owner's limit of liability under the Limitation Act with a new formula. That is, instead of limiting the vessel owner's

liability to the value of the vessel and its pending freight, Congress created a separate liability fund for claims arising from oil pollution in OPA 90. The new limitation was equal to $1,200 per gross registered ton, with respect to oil-carrying tank vessels. But, in doing so, Congress implicitly and explicitly ratified and reaffirmed that vessel owners and operators should have a measure of protection against the potentially crushing liabilities faced by those companies whose vessels are involved in maritime commerce and maritime casualties. Protection of the maritime industry from the uniquely enormous (and potentially uninsurable) liabilities which marine transportation companies face was a primary aim of Congress in 1851, when it passed the Limitation Act, just as it was in 1990 when it passed OPA 90. Congress had clearly in mind, in 1990, the estimated $3 billion in liability faced by Exxon Corporation as a result of the EXXON VALDEZ incident, and in OPA 90 Congress purposefully chose to limit vessel owner's liability for oil spill damages.[2] Similar to OPA 90's predecessors, the Clean Water Act ("CWA") and the Federal Water Pollution Control Act ("FWPCA"),[3] the trade-off for the owner/operator of the spilling vessel was that liability would be strict, subject only to limited defenses. But in return, the owner/operator would

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[2] The intent of Congress was quite clearly expressed in the text of the preamble of the OPA 90, which reads "An Act to establish limitations on liability for damages resulting from oil pollution . . . "

[3] 33 U.S.C. § 1251 *et seq.*

not be subject to crushing, potentially uninsurable, liability.[4]

Now, the Eleventh Circuit threatens to undo and cast aside that limitation protection with its ruling precluding *concursus*.

B. In order for vessel owners to limit their liability according to the provisions of OPA 90, there must be some procedure through which claims and assets can be marshaled for assessment and payment.

Because Congress intended vessel owners to be able to limit their liability, payment of claims under OPA 90 necessarily involves the equitable allocation of a limited fund. An equitable allocation of the fund among all claimants can only be achieved through the use of a marshaling order, producing a *concursus* of claims. If claims against a vessel owner/operator are not assembled into one controlling forum, the Courts cannot assure that the provisions of OPA 90, which allow vessel owners to limit their liability, will be given any effect. Even without conflicting decisions in different Courts, a vessel owner may be liable in each suit it defends for up to the applicable OPA 90 liability limit. Thus, without the guidance of one managing forum, through which all OPA 90 claims are adjudicated, the vessel owner/operator is left vulnerable to damages far beyond those contemplated by Congress in OPA 90. In actual fact, without the *concursus*

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[4] Under the CWA/FWPCA, liability could only be avoided if the oil spill had been caused by an act of war, an act of God, or the sole fault of a third party. 33 U.S.C. § 1321(f)(1)(A-D).

procedure of Rule F, the limits of liability set by Congress in OPA 90 are meaningless. This disregard of Congress' wishes cannot be permitted. *See Bouchard Transportation Company, Inc. v. Updegraff*, 147 F.3d 1344, 1351 (11th Cir. 1998), *citing Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-971 (5th Cir. 1981) ("A basic principle of statutory construction is that a statute should not be construed in such a way as to render certain provisions superfluous or insignificant"). Logic alone dictates that Rule F is a necessary tool for the implementation of OPA 90.

C. *Concursus* does not prejudice claimants in any way.

It is obvious that OPA 90 includes numerous provisions to protect the right of claimants to a full recovery for damages defined in OPA 90. However, the use of Rule F in no way prejudices the rights of claimants to full recovery. Indeed, the Eleventh Circuit's opinion does not show how the District Court's use of Rule F prejudiced claimants in any fashion to support the granting of relief sought by the claimants. The Eleventh Circuit's opinion is based entirely on its statutory construction of OPA 90, which must be wrong because it has no effect on the rights of claimants to recover but voids the limitation provisions that were included to protect the interests of vessel owners.

II. The Eleventh Circuit's decision will have a severe and negative impact on the marine transportation industry.

A. Insurance costs will rise sharply

Doing away with Rule F and the *concursus* procedure will significantly affect the marine insurance industry, and the knock-on effect on insurance costs will be deeply felt by AWO members. Simply put, the *concursus* procedure allowed the marine insurance industry to predict accurately the amount of liability its assureds would face in the event of an oil spill. If the limitation of liability regime is effectively annulled by denying vessel owners the use of the *concursus* procedure, the marine insurance industry will be left without the ability to calculate accurately the risk it underwrites. More importantly, the cost of claims will skyrocket. As a result, insurance against OPA 90 claims will become expensive and difficult to purchase. Additionally, many shipowners and operators may not be able to completely protect themselves through insurance, as only the larger companies will be able to afford high levels of insurance protection.

The difficulty in obtaining insurance will have far reaching effects in the shipping industry and will affect every vessel on American waters, because the application of OPA 90 is not limited to oil tankers. Every vessel on the water that carries oil as part of its fuel supply is also subject to the statute's provisions. Additionally, OPA 90 applies to all oil spills no matter how much oil is discharged. OPA 90 also applies to third-party vessels that cause oil to be spilled from other vessels or facilities.

Therefore, every vessel that navigates upon American waters is subject to OPA 90 and its liability provisions.

Furthermore, because OPA 90 applies to all vessel owners, and is not limited to corporate owners of super tankers, the decision of the Eleventh Circuit will have a disparate impact on small fleets and vessel owners, who do not have the financial resources to obtain the required certificates of financial responsibility, which are mandated by OPA 90 for certain types of vessels. Eventually, if vessel owners and operators are denied the use of the *concursus* procedure in OPA 90, causing claims and insurance costs to rise, OPA 90 will force the smaller vessel owners out of business because they will be unable to meet the statutory requirements.

B. *Concursus* has historically benefitted both shipowners and the public.

The *concursus* procedure mandated by Rule F provides that all claimants are brought together in one proceeding in order to adjudicate the common issues of liability and amount of damages, and provides for the "prompt and economical disposition [of] controversies." *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 415 (1954). In fact, this Court has recognized the importance of the principle of *concursus* in limitation actions:

> The heart of [the limitation] system is a *concursus* of all claims to ensure prompt economical disposition of controversies in which there are often a multitude of Claimants. . . . Moreover, it is important to bear in mind that the *concursus* is not solely for the benefit of the shipowner. The

> elaborate notice provisions of the Admiralty Rules are designed to protect injured Claimants.

Id. at 415, 417. The marshaling of claims in this manner prevents the very real risk and judicial waste of numerous and inconsistent rulings. Furthermore, preventing Courts from establishing a *concursus* of claims against the vessel owner in a limitation of liability proceeding under OPA 90 goes against the grain of a long-standing tradition of admiralty jurisprudence. The practice of marshaling all claims against vessel holders in a limitation proceeding, regardless of whether particular claims are indeed subject to limitation, has historically been upheld by the Federal Courts. *See British Transport Commission v. United States*, 354 U.S. 129 (1957) (following the established policy of litigating all claims in one forum); *The James Horan*, 10 F.Supp. 363, 363-364 (D.N.J. 1935), *aff'd*, 78 F.2d 870 (3d Cir.), *cert. denied*, 296 U.S. 621 (1935) ("it is established that the admiralty court, having taken jurisdiction to limit liability and having brought all claimants into concourse, will give complete relief and determine all matters relating to the subject. . . . [I]t is the practice of the Courts of admiralty to adjudicate all the claims in concourse even after the denial of limitation of liability.") (*citing Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207 (1927) and *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502 (1932)).

The Federal Courts have a sustained history of consolidating multiple claims pending in the same district to effect the same judicial efficiency promoted by Rule F. *See, e.g., Hines, Inc. v. United States*, 551 F.2d 717, 729 (6th Cir. 1977) (ordering consolidation of both limitable and

non-limitable claims for trial); *In re Chinese Maritime Trust, Ltd.*, 478 F.2d 1357, 1361 (2d Cir. 1973), *cert. denied*, 414 U.S. 1143 (1974) (consolidating non-limitable claim with limitation action to "avoid duplicative litigation of identical issues;" requiring as a condition of allowing a non-limitable claim to go forward that the parties stipulate to its prosecution in the forum with jurisdiction over the related limitation proceeding); *In re Lloyd's Leasing, Ltd.*, 764 F. Supp. 1114, 1137 (S.D. Tex. 1990) (non-limitable Clean Water Act governmental claim consolidated with limitation action). Furthermore, without implementation of Rule F, those claims that are both limitable and non-limitable (based on general maritime law or state law) will be split between the limitation forum and the forum of the claimant's choosing. Such interspersion of claims runs completely counter to traditional prohibition against splitting causes of action among various Courts or forums. *See Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320 (1927). Moreover, since a limitation action to marshal non-OPA 90 claims will undoubtedly be filed in most, it not all, maritime casualties, it simply makes no sense not to allow (and indeed, require) the same court to hear the non-OPA 90 and the OPA 90 claims.

III. Denying vessel owners the use of Supplemental Rule F imposes upon them an arbitrary and unfair burden with regard to the cost and hardship of litigation.

For the American shipping industry, the problems created by Eleventh Circuit's decision are numerous and far reaching. If the Eleventh Circuit's decision is allowed

to stand, all claimants involved in an oil spill casualty will be free to sue vessel owners in separate and independent actions in various jurisdictions throughout the country. Aside from being horribly inefficient, as the vessel owners would be forced to defend many actions in as many jurisdictions, this result is incompatible with the federal policy against multiple and piecemeal litigation and its potentially conflicting results. *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 217 (1902) ("The law will not permit the splitting up into separate suits of different grounds for the same relief.").

The Eleventh Circuit sanctions the splitting of claims, which can be brought as general maritime law claims in the usual Limitation Act *concursus*, and then brought in a different court under the guise of an OPA 90 claim.[5] For example, a claimant that cleaned up oil from its real or personal property might file a claim in the limitation action brought by the vessel owner, while at the same time bringing a separate OPA 90 action in a different court for the same damages, in order to ensure full recovery. Furthermore, by denying the use of the procedural tool of Rule F and *concursus* of claims, the Eleventh Circuit encourages potential claimants to commence a race to the courthouse and a race to judgment, in an effort to reach the limited fund before it can be exhausted by the first claims to be adjudicated. Indeed, if the first court to reach a judgment held that the OPA 90 limitation

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[5] OPA 90 expressly does not pre-empt other law, including state law. 33 U.S.C. § 2702 (a) ("Notwithstanding any other provision or rule of law. . . . ").

amount should be the proper limit of the owner/operator's OPA 90 claims liability, all the other litigations should end, if the limitation amount were exhausted by the first action. Those claimants then must turn to the Oil Spill Trust Fund, administered by the U.S. Coast Guard, for payment of their claims. All the other litigations would have been wasted efforts. (But a judge that was not bound by the first decision could continue the litigation before that Court and reach a contradictory result.) So both a race to the Courthouse and a race to judgment is the inevitable result of the Eleventh Circuit's decision.

The traditional procedural safeguard of *res judicata* will not ease the burden of the Eleventh Circuit's decision because of the persistent lack of symmetry of the parties. *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) (indicating that *res judicata* bars further claims only by the same parties or their privies). The absence of any supplementary procedural rules with which the Courts can protect vessel owners from years of continuous and repetitive litigation only further endorses the logic of applying the *concursus* procedure of Rule F to these claims.

The Eleventh Circuit's decision creates other practical problems for the American shipping industry. With each additional and subsequent claim filed in each individual jurisdiction, the particular vessel at issue will be subjected to an additional maritime arrest or attachment proceeding. Supplemental Rule B allows for the attachment of a vessel as a form of substituted service of process upon the vessel owner *in personam*. Without the enjoinment of other actions or proceedings through Rule F(3), an otherwise viable and productive vessel will be

taken out of commerce entirely while the numerous petitions against it are adjudicated over many years. Meanwhile, the detained vessel becomes an even greater liability to its owner as its inaction prevents payment of insurance premia and ship mortgages.

CONCLUSION

If the Eleventh Circuit's ruling is allowed to stand, it will produce direct and disastrous consequences for the American shipping industry. By denying vessel owners the right to marshal the claims filed against them into one proceeding to distribute the limitation fund equitably, the Eleventh Circuit has essentially invalidated the wish of Congress that a vessel owner's liability for damages arising from an oil spill be capped at a defined limit.

Furthermore, the Eleventh Circuit's ruling virtually sentences vessel owners to years of continuous litigation. Meanwhile, the vessels involved in the particular incidents will remain caught in never ending proceedings, remaining unproductive and unprofitable. In time, the backlog of the Courts and inevitable bankruptcy of vessel owners will gradually deplete our nation's fleet of petroleum carrying vessels. Vessel owners who remain in business will be forced to buy added liability insurance (provided, of course, that insurance for unlimited liability under OPA 90 is available and affordable) and spend enormous resources in litigation expenses. The ultimate burden of this ruling will therefore fall upon the American consumer as the cost of transporting petroleum products is increased sharply. Accordingly, the Eleventh

Circuit's decision presents grave consequences that will reach far beyond the Florida incident and the individual parties involved in this case. If upheld, the decision will drastically impact the entire marine transportation industry, and America's oil industry. For the foregoing reasons, AWO respectfully requests that the Petitioner's Writ be granted, and the Eleventh Circuit's decision be reviewed and reversed.

Respectfully submitted,

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